

No. 1-09-1591

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	
	)	No. 08 CR 12025
GERARDO GOMEZ,	)	
	)	
Defendant-Appellant.	)	Honorable
	)	James B. Linn,
	)	Judge Presiding.

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**ORDER**

JUSTICE SALONE delivered the judgment of the court.  
Justices Neville and Murphy concurred in the judgment.

*HELD:* Evidence was sufficient to sustain defendant's convictions; defense counsel was not ineffective for failing to file a motion to suppress; aggravated battery and UYW convictions are not lesser-included offenses of robbery; robbery is not a lesser-included offense of vehicular invasion

¶ 1 Following a bench trial, defendant Gerardo Gomez was convicted of vehicular invasion,

robbery, aggravated battery, two counts of aggravated unlawful use of a weapon (UUW), UUW by a felon, and being an armed habitual criminal. After the denial of his posttrial motion, he was subsequently sentenced as a class X offender to concurrent prison terms of eight years for vehicular invasion, eight years for robbery, five years for aggravated battery, and seven years for the weapon charges. Defendant raises the following contentions on appeal: (1) whether he was proven guilty beyond a reasonable doubt based on tainted in-court identification by State's single eyewitness and insufficient evidence to link him to the incident; (2) alternatively, whether he received ineffective assistance of counsel where counsel did not file a motion to suppress the identification testimony; and (3) whether his multiple convictions violate the One Act, One Crime Doctrine because they arise from the same physical act. For the following reasons, we affirm.

## ¶ 2 BACKGROUND

¶ 3 The evidence presented at trial established that customs agent Faraz Ilyas' (Agent Ilyas) service revolver was taken from him while he was off-duty on June 14, 2008.

¶ 4 Agent Ilyas testified that he was employed as a customs agent for the Department of Homeland Security. As part of his employment, Agent Ilyas was authorized to carry a service revolver while he was both on- and off-duty. At approximately 11:30 p.m. on the day of the incident, he was in the Humboldt Park neighborhood to pick up his cousin, who had attended the Puerto Rican Day festival. Agent Ilyas was off-duty, and the revolver was in his "off duty pancake holster," which he described as "more snugged and concealed" than his duty holster. At that time, Agent Ilyas was wearing no clothing or other insignia that identified him as a law

1-09-1591

enforcement officer.

¶ 5 When Agent Ilyas arrived in the area, he parked his car approximately 10 blocks from the location of the festival. Upon locating his cousin, they, along with Shantel Rodriguez, Deliliah Martinez and a young man related to one of the women, walked to Martinez' car in a nearby lot so that she could drive Agent Ilyas and his cousin back to his car. Agent Ilyas had never met either of the women or the young man prior to that time. When they reached the car, Martinez got in the driver's seat, Agent Ilyas sat in the front passenger seat, and everyone else got into the back seat. The car's windows were rolled down, but the radio was not on. According to Agent Ilyas, as Martinez attempted to leave the lot, the exit was blocked by a group of 15 to 20 Hispanic men. The men asked them who they were and where they were from. Martinez honked the horn and asked the men to move out of the way, but they did not. The men then surrounded the car and began to shout gang slogans and profanities. Agent Ilyas testified that four of the men were near his window. They struck him, attempted to choke him, covered his eyes and attempted to pull him from the car through the open window. Agent Ilyas identified defendant in court as one of the men who was outside of the car window on the date of the incident.

¶ 6 Agent Ilyas testified that defendant was wearing a red t-shirt and denim shorts that night, and that another of the men wore a yellow and white t-shirt. According to Agent Ilyas, defendant and the man in the yellow and white t-shirt reached into the car, attacked him and grabbed at his gun. Just prior to the gun being taken, Agent Ilyas told the men to stop and identified himself as a police officer. He was unsure which of the men took the gun, however, defendant was face-to-face with him in the car window and struck him in the face with the gun. The gun was then

1-09-1591

waved around and pointed at the occupants of the car. Agent Ilyas could not see who waved the gun because he was still being hit by men outside of the car. He yelled to Martinez to drive away and she was able to leave the lot.

¶ 7 After leaving the lot, they saw a police car approximately one block away, and Agent Ilyas told the officers what happened. He described defendant as a "male Hispanic, short hair, wearing a red t-shirt and blue jean shorts." Shortly thereafter, Agent Ilyas and the occupants of the car returned to the lot where he saw defendant being held by police. He identified defendant as the person who struck him and indicated that he was one of the people who grabbed his gun. Agent Ilyas also told police that the other men in the lot were the ones involved in the incident. The police subsequently recovered a gun which Agent Ilyas identified as his service revolver. Agent Ilyas had bruises on his face and neck as a result of the incident, but did not seek medical attention.

¶ 8 On cross-examination, Agent Ilyas testified that there were many people wearing red t-shirts that night and that the colors of the Puerto Rican flag are red, white and blue.

¶ 9 Delilah Martinez testified that when she attempted to drive out of the parking lot, she was unable to do so because five or six Hispanic men in the parking lot "confronted" and "basically bombarded" her car and prevented her from leaving. She heard "gang-banging" words outside of the car as the men asked who they were and where they were from. Martinez talked to one of the men outside of her window in an attempt to get him to calm down the other men in the parking lot and subsequently asked him to let them leave because they did not want any trouble. She looked over in the passenger seat and saw Agent Ilyas struggling with one of the men who was

1-09-1591

outside of the car and she also saw a gun. Both men had their hands on the gun. Martinez became scared, accelerated on the gas and drove through a barricade to exit the lot. As soon as she reached the street, she saw police squad cars and she stopped. Martinez further stated that she had just met Agent Ilyas and his cousin that night and knew that he was a cop, but had not seen him with a gun prior to the struggle.

¶ 10 On cross-examination, Martinez testified that she was unable to identify the man who struggled with Agent Ilyas for his gun and was unable to identify anyone involved in the incident. She agreed that there were "thousands" of people in attendance at the festivities that evening, and there were many people wearing red t-shirts. When Martinez parked her car in the lot, there were five or six people collecting money. When she returned to her car that evening, she heard no words exchanged between the men in her group and those in the parking lot.

¶ 11 Chicago police officer Herlehy testified that she was on duty but not in uniform on the night of the incident. She was assigned to monitor the area surrounding the Puerto Rican festival. At approximately 11:30 p.m., Officer Herlehy heard a flash message over the radio that a weapon had been taken from a customs agent during a robbery in the 1400 block of Fairfield. The suspect was described as a male Hispanic wearing a red t-shirt and denim shorts. Officer Herlehy went to a parking lot at 1442 North Fairfield to assist in the investigation. When she arrived, she saw several police officers there and others leaving the festival. Officer Herlehy's saw a male Hispanic wearing a red t-shirt and denim shorts in the vacant lot that was converted into a parking lot. She testified that he caught her attention because he was near the only two vehicles in that area of the lot and watched him "kind of walking" between the vehicles and the

1-09-1591

fence, which was a "very, very small area." Officer Herlehy identified defendant in court as the man she saw in the lot.

¶ 12 Officer Herlehy watched defendant walk along the two vehicles in the lot, which were parked one in front of the other. When defendant reached the second vehicle, she lost sight of him "for a moment," but he reappeared "within seconds," and walked in front of the second vehicle before walking back through the lot towards her. Officer Herlehy did not see any other people near defendant in the lot by the vehicles. When she saw defendant leaving the area, Officer Herlehy asked other officers to detain him while she went to the area near the vehicles where she first saw defendant. She searched the area and found a loaded handgun hidden in the front passenger's side wheel well of a truck in the lot. Officer Herlehy unloaded the gun and subsequently asked Agent Ilyas whether the gun was his. Agent Ilyas identified the gun and defendant in Officer Herlehy's presence.

¶ 13 On cross-examination, Officer Herlehy testified that she did not know how many people or vehicles were in the lot prior to her arrival. There were a lot of people on the sidewalk and in the street when she arrived, and she did not notice any other officers in the lot. Officer Herlehy never saw defendant with the gun, nor did she interview him. Further, she never determined who owned the truck from which she recovered the gun, however, Officer Herlehy reiterated that when the gun was shown to Agent Ilyas at the scene, he identified it as his. She further stated that she never fingerprinted the gun, although she believed that it had been fingerprinted.

¶ 14 The State entered a certified copy of defendant's conviction for delivery of a controlled substance into evidence through a stipulation with defense counsel. The State then rested its

1-09-1591

case-in-chief.

¶ 15 After the denial of his motion for directed finding, defendant presented the testimony of his sister, Christina Gomez. She testified that on June 14, 2008, she was in the area of 1442 North Fairfield standing in a parking lot with defendant and her older brother, Jose. Gomez stated that she and defendant helped Jose park cars in the lot for the carnival and she saw a "whole bunch" of guys fighting and yelling around a white car at approximately 11:30 p.m. Gomez and defendant stood five feet from the white car, and she never saw him do or say anything to anyone in the white car. Additionally, she never saw defendant with the six or seven people who were surrounding the white car, nor did she see him handle a gun that night.

¶ 16 On cross-examination, Gomez testified that while she had been drinking that day, "everybody out there" had been drinking, including defendant. She stated that she loved defendant and took her children to visit him in jail. Gomez further stated that she and defendant had never discussed exactly what occurred on June 14, 2008.

¶ 17 Defendant indicated to the court that he did not wish to testify, and the defense rested.

¶ 18 Defendant was found guilty of all charges and the court inquired as to any other criminal convictions in his background. The State indicated that defendant had six prior felony convictions and five terms of incarceration.

¶ 19 On May 14, 2009, defendant filed a posttrial motion, alleging among other things, that the State failed to prove him guilty as an armed habitual criminal because only one certified conviction was admitted into evidence instead of the two listed in the indictment. The trial court subsequently vacated defendant's armed habitual criminal conviction and denied the remainder of

the new trial motion. The matter then proceeded to the sentencing hearing.

¶ 20 At the sentencing hearing, the State argued that defendant was eligible for mandatory sentencing as a Class X offender because of the number of prior class 2 convictions. Defendant stated that he was "kind of disappointed" that he was found guilty and that he learned a lot in the drug program. The trial court subsequently sentenced him to eight year terms for vehicular invasion and robbery, a seven-year term for the three gun offenses which merged into one, and a five-year term for aggravated battery, all concurrent. Defendant's post-sentencing motion was denied and this timely appeal followed.

#### ¶ 21 DISCUSSION

¶ 22 Defendant raises the following contentions on appeal: (1) whether he was proven guilty beyond a reasonable doubt based on tainted in-court identification by State's single eyewitness and insufficient evidence to link him to the incident; (2) alternatively, whether he received ineffective assistance of counsel where counsel did not file a motion to suppress the identification testimony; and (3) whether his multiple convictions violate the One Act, One Crime Doctrine because they arise from the same physical act.

#### ¶ 23 Sufficiency of the Evidence/Ineffective Assistance of Counsel

¶ 24 Defendant first contends that he was not proven guilty beyond a reasonable doubt because both the out-of court and in-court identifications by Agent Ilyas were the product of a suggestive "show-up"; the original description of the offender was vague; the victim only had a compromised, limited opportunity to view the offender; and the State's remaining evidence was insufficient to connect him to the offense. Defendant specifically alleges that Agent Ilyas'



identification was doubtful, unreliable and inadequate to sustain a conviction; and that his wearing of a red t-shirt during the Puerto Rican Day Festival, being spotted in the vicinity of a handgun which was left in a parking lot are all insufficient to connect him to the incident. He seeks an outright reversal of each conviction.

¶ 25 The standard of review that applies where a defendant challenges the sufficiency of the evidence requires that we decide, after viewing the evidence in the light most favorable to the State, whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Jones*, 364 Ill. App. 3d 740, 746 (2006). A conviction will not be reversed unless the evidence is so " 'unreasonable, improbable or unsatisfactory that it raises a reasonable doubt of the defendant's guilt.' " *Jones*, 364 Ill. App. 3d at 746 quoting *People v. Evans*, 209 Ill. 2d 194, 209 (2004).

¶ 26 Defendant first contends that both the out-of court and in-court identifications by Agent Ilyas were the product of a suggestive showup. We note that defendant failed to file a pretrial motion to suppress the out-of court identification, failed to object to the admission of this evidence at trial, and failed to include this specific issue in his posttrial motion. Accordingly it is waived. *People v. Bounds*, 171 Ill. 2d 1, 40 (1995).

¶ 27 Defendant, however, argues in the alternative that defense counsel was ineffective for failing to file a pre-trial motion to suppress the identification testimony.

¶ 28 To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that his counsel's representation was deficient and that he was prejudiced by that deficiency. *People v. Johnson*, 372 Ill. App. 3d 772, 777 (2007), citing *Strickland v. Washington*, 466 U.S.

668, 104 S. Ct. 202 (1984). Where a defendant fails to satisfy *Strickland's* second prong by failing to show prejudice, the reviewing court need not determine whether *Strickland's* first prong of deficient performance has been met. *Johnson*, 372 Ill. App. 3d at 777. A defendant is prejudiced if there is a reasonable probability that the outcome of the trial would have been different or that the result of the proceeding was unreliable or fundamentally unfair. *Johnson*, 372 Ill. App. 3d at 777.

¶ 29 Here, defendant contends that the suggestive showup at the scene tainted both the out-of-court and in-court identification by Agent Ilyas and that trial counsel's failure to file a motion to suppress was objectively unreasonable.

¶ 30 To establish prejudice in the context of counsel's failure to file a motion to suppress, a defendant must show a reasonable probability that the motion would have been granted and the outcome of the trial would have been different had the evidence been suppressed. *People v. Morales*, 339 Ill. App. 3d 554, 563 (2003). Trial counsel's failure to file a motion to suppress evidence does not establish incompetent representation when the motion would be futile. *Morales*, 339 Ill. App. 3d at 563.

¶ 31 Although one person showups are inherently suggestive and not favored as a means of identification, they are justified under limited circumstances. *People v. Hughes*, 259 Ill. App. 3d 172, 176 (1994), citing *People v. McKinley*, 69 Ill. 2d 145, 151 (1977); *People v. Manion*, 67 Ill. 2d 564, 569-70 (1977). A trial court must determine, under the totality of the circumstances, whether the confrontation was so unnecessarily suggestive that it would lead to irreparable mistaken identity. *Hughes*, 259 Ill. App. 3d at 176. This is a two-part test. *Hughes*, 259 Ill.

1-09-1591

App. 3d at 176. First, the suggestiveness and necessity of the identification must be examined. *Hughes* 259 Ill. App. 3d at 177. Showup identifications are permissible and not unnecessarily suggestive where the witness had a clear opportunity to observe the offender during the commission of the offense and where the police are in pursuit of the offender within minutes of the offense. *Hughes*, 259 Ill. App. 3d at 177; *People v. Follins*, 196 Ill. App. 3d 680, 689 (1990). " 'Prompt identification procedure insures accuracy by fostering the desirable objectives of fresh, accurate identification that may facilitate the release of an innocent suspect as well as enabling the police to resume their search for the offender.' " *Hughes*, 259 Ill. App. 3d at 177, quoting *McKinley*, 69 Ill. 2d at 153.

¶ 32 In the present case, the incident occurred while Agent Ilyas was seated in the passenger side of Martinez's vehicle through the open window. Accordingly to Agent Ilyas, at least two of the men outside of the car reached inside and attempted to pull him out of the car. He testified that one of the men was wearing a yellow and white shirt and the other man was wearing a red t-shirt and denim shorts. As to defendant, Agent Ilyas testified that he was face-to-face with defendant during the attack and ensuing robbery. He further testified that defendant hit him in the face with the gun. We find that Agent Ilyas had sufficient time and excellent opportunity to observe defendant. Additionally, the evidence established that the showup occurred in close proximity to the offense. Both Agent Ilyas and Martinez testified that as soon as they were able to exit the parking lot and reached the street, they saw police and reported the incident. Officer Herlehy testified that she went to the scene after hearing a flash message about the robbery. Subsequent to her arrival, she observed a person matching the description given in the flash

1-09-1591

message and had him detained. Agent Ilyas then identified him as the person who hit him in the face with the gun. We conclude based on this evidence that the showup was not necessarily suggestive.

¶ 33 Next, we determine if the identification was reliable. *Hughes*, 259 Ill. App. 3d at 177. Factors to consider in determining whether an identification is reliable are: (1) the opportunity the witness had to view the offender at the time of the offense; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the offender; (4) the level of certainty demonstrated by the witness at the identification confrontation; and (5) the length of time between the incident and the identification confrontation. *Hughes*, 259 Ill. App. 3d at 177, citing *Neil v. Biggers*, 409 U.S. 188, 199-200, 93 S. Ct. 375, 382 (1972).

¶ 34 The record supports a finding of reliability of the identification. As previously stated, Agent Ilyas testified that he was face-to-face with defendant during the attack. His attention was on defendant during the incident; he stated that defendant attacked him and struck him in the face with the gun. Agent Ilyas described the offender to police as a male Hispanic wearing a red t-shirt and denim shorts, which matched the description of defendant when he was detained by police. Agent Ilyas identified defendant right away when he returned to the scene. Although the record does not indicate the specific time frame between the offense and the identification confrontation, however, it is clear that it was a very short period of time. We conclude that the identification was reliable.

¶ 35 As the burden is on defendant to show that the identification procedure was unduly suggestive and conducive to an irreparably mistaken identity (*Hughes*, 259 Ill. App. 3d at 177),

which is not met in this case, we find that a motion to suppress based on a suggestive showup would not have been successful. It follows then that trial counsel was not ineffective for failing to file a motion to suppress and defendant was not prejudiced by trial counsel's failure to file the motion.

¶ 36 Turning back to defendant's sufficiency of the evidence argument, he further contends that the evidence presented was insufficient to connect him to the offense. We disagree.

¶ 37 Viewing the evidence in the light most favorable to the State, we find that the evidence was sufficient to support defendant's convictions. We have already determined that the identification testimony was reliable. The testimony of a single, credible witness can be sufficient to support a conviction if the witness observed the defendant under conditions permitting a positive identification. *Morales*, 339 Ill. App. 3d at 563, citing *People v. Houston*, 151 Ill. App. 3d 102, 110 (1986). Additionally, the record indicates that upon arriving at the scene, Officer Herlehy observed defendant wearing the clothing as described in the flash message and that he caught her attention because he was walking between the only two vehicles in a certain area of the lot and upon further investigation, discovered a gun hidden in the passenger's side wheel well of one of those vehicles. Agent Ilyas subsequently identified the recovered gun as his. None of the evidence is so improbable or unreasonable as to create a reasonable doubt of defendant's guilt.

¶ 38 One-Act, One-Crime Doctrine

¶ 39 Finally, defendant contends that he was convicted of multiple offenses that arose from the same physical act, which violates the "One-Act, One-Crime Doctrine." He urges this court to

vacate his convictions for aggravated battery and the three aggravated UUV conviction because they are all based on the same physical act as the robbery. Additionally, he contends that his conviction for robbery should be vacated because it is a lesser-included offense of vehicular invasion.

¶ 40 Although defendant does not acknowledge it, the record reveals that defendant did not raise this issue before the trial court, and it is accordingly forfeited. *People v. Nunez*, 236 Ill. 2d 488, 493 (2010). However, our supreme court has held that forfeited one-act, one-crime arguments are properly reviewed under the second prong of the plain-error rule because they implicate the integrity of the judicial process. *People v. Harvey*, 211 Ill. 2d 368, 389 (2004); *People v. Artis*, 232 Ill. 2d 156, 167-68 (2009); *Nunez*, 236 Ill. 2d at 493. Thus, we will review the merits of defendant's arguments.

¶ 41 Whether a defendant has been improperly convicted of multiple offenses based upon the same act and whether a charge encompasses another as a lesser-included offense are questions of law that are reviewed *de novo*. *Nunez*, 236 Ill. 2d at 493. In *People v. Rodriguez*, 169 Ill. 2d 183, 186 (1996), our supreme court noted that in a one-act, one-crime analysis, a court must first determine whether a defendant's conduct consists of one act or several acts. Multiple convictions are improper if they are based on precisely the same physical act. *Nunez*, 236 Ill. 2d at 494. The *King* court defined "act" as "any overt or outward manifestation which will support a different offense." *People v. King*, 66 Ill. 2d 551, 566 (1977). A defendant can be convicted of two offenses when a common act is part of both offenses. *Rodriguez*, 169 Ill. 2d at 189. If it is determined that the defendant committed multiple acts, the court must then determine whether

1-09-1591

any of the offenses are lesser-included offenses. *Nunez*, 236 Ill. 2d at 494. If so, then multiple convictions are improper. *Nunez*, 236 Ill. 2d at 494.

¶ 42 Defendant first contends that his convictions for aggravated battery and aggravated UUW must be vacated because they are based on the same physical act as his robbery conviction.

Turning first to the aggravated battery conviction, from the evidence presented at trial, the acts which formed the basis of this conviction were the striking of the victim on the face, choking, and hitting the victim in the face with a gun, while the robbery conviction was based on the act of taking the gun. While closely related, we find that the acts were not one physical act, but were separate acts. Separate acts do not become one solely because of proximity in time. *People v. Pearson*, 331 Ill. App. 3d 312, 322 (2002). As such, this contention is without merit and defendant's aggravated battery conviction will stand.

¶ 43 Defendant next contends that his convictions for aggravated UUW were based on the same physical act as his robbery conviction because in taking the gun from the victim during the course of the robbery, he simultaneously possessed the gun. We disagree.

¶ 44 The acts which formed the basis of the aggravated UUW convictions were based on defendant's act of possessing the gun, while the robbery conviction was based on the act of taking the gun. Again, while these acts are closely related, they were not one physical act but separate acts. As such, defendant's convictions for aggravated UUW stand.

¶ 45 Finally, defendant contends that robbery is a lesser-included offense of vehicular invasion and as such, his robbery conviction must be vacated.

¶ 46 Section 2-9 of the Criminal Code of 1961 (Code) defines a lesser-included offense as an

offense established by proof of lesser facts or mental state, or both, than the charged offense. 720 ILCS 5/2-9 (West 2008). Our supreme court recently determined that the abstract elements approach applies to determine whether one charged offense is a lesser-included offense of another under *King*. *People v. Miller*, 238 Ill. 2d 161, 176 (2010). Under the abstract elements approach, a comparison is made of the statutory elements of the two offenses. *Miller*, 238 Ill. 2d at 166. If all of the elements of one offense are included within a second offense and the first offense contains no element not included in the second offense, the first offense is deemed a lesser-included offense of the second. *Miller*, 238 Ill. 2d at 166. It must be impossible to commit the greater offense without necessarily committing the lesser offense. *Miller*, 238 Ill. 2d at 166.

¶ 47 According to the Code, a person commits robbery when "he or she takes property \* \* \* from the person or presence of another by the use of force or by threatening the imminent use of force." 720 ILCS 5/18-1 (West 2008). A person commits vehicular invasion when "he knowingly, by force and without lawful justification, enters or reaches into the interior of a motor vehicle while the motor vehicle while the motor vehicle is occupied by another person or persons, with the intent to commit a theft or felony therein." 720 ILCS 5/12-11.1(a) (West 2008).

¶ 48 Here, defendant forcibly reached into the interior of a vehicle occupied by Agent Ilyas and others and took a handgun. Based on these actions, defendant was convicted of vehicular invasion (due to reaching into the vehicle with intent to commit robbery) and robbery (due to the actual taking of the handgun). Vehicular invasion only requires the intent to commit a theft or



1-09-1591

felony and not an actual theft or felony. As such it is possible to commit vehicular invasion without necessarily committing a lesser offense, robbery in this case. Moreover, all of the elements of robbery are not included within vehicular invasion, nor does robbery contain any elements of vehicular invasion. Accordingly, we find that robbery is not a lesser-included offense of vehicular invasion, defendant's robbery conviction will stand.

¶ 49 CONCLUSION

¶ 50 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 51 Affirmed.